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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIC BURGERS, Plaintiff and Appellant, v. VINCENT CARDENAS et al., Defendants and Respondents.	G051833 (Super. Ct. No. 30-2013-00656746) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed.

Day Law Offices and Montie S. Day for Plaintiff and Appellant.

Gilbert, Kelly, Crowley & Jennett, Timothy W. Kenna, Rebecca J. Smith, and Kristin A. Ingulsrud for Defendants and Respondents.

Eric Burgers appeals from a judgment in favor of Vincent Cardenas and his son, Christopher Anthony Cardenas (collectively referred to in the singular as Cardenas). Burgers contends the trial court erred in admitting and excluding certain evidence, refusing to modify Judicial Council of California Civil Jury Instruction (CACI) No. 3903J, allowing a credit against the verdict for the amount paid by Cardenas's insurer in response to a subrogation demand, and awarding costs to Cardenas. We conclude no error occurred and affirm the judgment.

Burgers requested this court take judicial notice of "[t]he California State Judicial Council Record of its business meeting held on December 11, 2015" and "[t]he new and revised California Judicial Council Jury Instruction 3903J relating to 'property damage' and the measure of such damages." We deny the motion because these documents were not before the trial court. (See *Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444, fn. 3; *The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404.)

FACTS AND PROCEDURAL BACKGROUND

I. Stipulated Facts

The parties stipulated to the basic underlying facts: On October 31, 2012, Burgers's son was driving Burgers's 2009 BMW M3 (the vehicle). While legally stopped at a red light, the vehicle was rear-ended by Cardenas's vehicle. It took 78 days to repair the vehicle (from October 31, 2012, to January 16, 2013) and the bill totaled $25,266.33. Burgers sued Cardenas for negligence and negligence per se, seeking to recover the costs of the repairs, the diminished value of the vehicle after the repairs, and the loss of the vehicle's use for 78 days.

II. Trial Testimony

The testimony presented at trial focused on damages. The following facts were undisputed: The vehicle's original owner purchased it in 2009. In January 2012, Burgers acquired the vehicle, having 16,635 miles, for close to $60,000. In June 2014, a

few years after the October 2012 collision, Burgers received a trade-in value of $30,000 for the vehicle, which he used toward his purchase of a different car. At the time of trade in, the vehicle had approximately 31,452 miles on it. When he traded in the car, Burgers recalled he disclosed the vehicle had been involved in an accident. However, he also admitted he signed a document, under penalty of perjury, saying the vehicle had never been involved in an accident. Burgers claimed he did not read that provision before signing the document.

Allen Khatchik, the manager of the pre-owned division of Rusnak Auto Group (Rusnak), testified he negotiated the trade-in with Burgers. He stated Burgers never told him the vehicle was involved in a substantial accident or that the repair costs exceeded $25,000. When Khatchik inspected the vehicle, he did not notice any structural damage, but he observed new paint on "[t]he bumper, trunk, and two rear fenders, quarter panels." When he asked Burgers about it, Burgers told him "the car got tapped in the back and we replaced the rear bumper and redid all the paint work." Based on Burgers's representation, Rusnak accepted the vehicle on trade in and resold it. When Cardinas's counsel showed Khatchik the repair estimate for the collision damages, he testified the damage had been "pretty severe" and not just a tap. He testified that had he known about the severity of the damage and the repair costs he would not have offered $30,000 for the vehicle's trade in.

Two experts testified at trial regarding, inter alia, the issue of diminished value. Burgers's expert, Rocco Avellini, is the president of Wreck Check Car Scan Centers. He opined that although the vehicle was repaired, certain items could never be duplicated, because "the preciseness of a robotic application" on an assembly line cannot be replicated by humans. In his view, the diminished value of the repaired vehicle was $30,202.85, whereas, the value of the vehicle before the accident was $49,762.

Cardenas's expert, Neil Thomas, worked for West Coast Auto Appraisals. His initial calculation of the vehicle's diminished value totaled $8,882. His opinion

changed after he discovered Burgers received $30,000 when he traded in the vehicle and that the vehicle was later resold for $42,900. He noted the vehicle was resold for its fair market value nearly three years after Burgers purchased it plus the vehicle had another "10,700 miles on it from the time of loss." Using Avellini's Wreck Check report, Thomas opined the retail value based on comparables was $49,762, and Rusnak offered the same car for sale for $42,990 (a price difference of $6,772 dollars). He concluded if the price was adjusted for additional mileage, "which is a [$]1,560 . . . difference, that means in three years of motoring on a retail-to-retail basis, this car has lost [$]5,212 . . ., which is pretty good for motoring around in a car for three years." Based on these circumstances, Thomas concluded there was no diminished value suffered.

Thomas agreed with Avellini that had the accident and repairs been disclosed, "any potential buyer of this car would not elect to purchase [it] for full retail value." But because those facts were not disclosed, "It didn't impact the value of this car."

III. Evidentiary Rulings

The court made two evidentiary ruling, which we include in our summary of facts because Burgers challenges them on appeal.

A. *Exclusion of Subsequent Buyer's Testimony*

Burgers sought to call "Mr. Copelan," the person who purchased the vehicle from Rusnak. He stated Copelan was expected to testify that when he tried to trade in "his recent car,"[1] Rusnak would not take it because CarFax showed it had been

[1] It is unclear if this is the same vehicle traded in by Burgers or a different vehicle. Cardenas assumes it is the same vehicle. But the record suggests it is a different vehicle because while the one traded in by Burgers had a clean CarFax report, the one described here as Copelan's "recent car" had been involved in an accident and did not have a clean CarFax report. Carfax, Inc. is a web-based service that supplies a vehicle's accident and collision history. (See *Tun v. Wells Fargo Dealer Servs., Inc.* (2016) 5 Cal.App.5th 309, 315.)

involved in an accident. Burgers wanted to use this testimony to demonstrate Rusnak engaged in fraudulent transactions. He explained Rusnak accepted Burgers's trade in only "because it didn't show up on the CarFax report" and thus could be resold "at full value."

The court disallowed the testimony as being "duplicative, redundant, and potentially distracting with respect to the actual issues in this case," doing nothing "other than attempting to cast a sense of ill will on the part of the jury about Rusnak . . . ." It added, "Rusnak is not on trial. All that the witness would confirm is that in this instance he bought a car that also didn't show damage. That [when] he offered them a car with damage they wouldn't take. That latter part the witness has already confirmed, that he doesn't think they would take it either knowing about damage. [¶] And this implicates or purports to implicate Rusnak in a way that doesn't affect the issues in this case, which is what the value of the car was. Repairs are not an issue . . . . [¶] The only question the jury will have to resolve is the diminution in value question."

B. Attempts to Impeach Cardenas's Expert

During cross-examination, Burgers's attorney, Montie S. Day, sought to challenge Thomas's expert qualifications by attacking his membership in the International Automobile Appraisers Association (IAAA). Day first asked if Thomas knew Monty Sombrero. Thomas responded he "kn[e]w of him" and he had been an umpire for him. Thomas could not recall when Sombrero was an IAAA member or why he stopped being one.

Next, Day inquired whether Thomas knew Zachary Romer. When Thomas replied he did not, Day asked if Thomas was aware Romer was an IAAA member who testified in another case that "his certification [as an IAAA appraiser] was done by his high school buddy," and "his only training in automobile repairs . . . was freshman year auto shop." Thomas answered he did not know Romer, his qualifications, or his training. Thomas stated he "wouldn't know [him if] I met him."

Cardenas's counsel objected to this line of questioning after Day offered to "bring a transcript in." The trial court told Day he could not testify about the information but he was "certainly entitled to ask this witness whether he knows anything about . . . Romer's qualifications."

Outside the jury's presence, Day explained he was trying to show organizations such as IAAA, "many times are absolutely phony, false, et cetera." The court responded, "You are obviously at liberty to challenge a witness's credentials. What you can't do is effectively testify and then have the witness say, 'I have absolutely no information bearing on that,' but you have managed to testify to information that is otherwise not before the court or admissible. [¶] . . . [¶] . . . Unless you have a way to substantiate the evidence which you're presenting, putting it to a witness and having him say, 'no idea,' is an indirect way of getting it before the jury, which is not okay."

Day indicated he was trying to impeach Thomas by showing "there is no training process as . . . Romer in this trial talked about." The court replied it would not allow further questioning along those lines if that was all Day had "because you're not able to substantiate contentions" by asking "a witness who denies any knowledge of those contentions."

Day then informed the court he intended to show that another IAAA member, "Sombero," was "an 80-year-old sexual pedophile convicted for having sex with minors under the age of 14 [to show] [t]hese companies are phony and they're funded by the insurance companies and supported by them." The court ruled, "Whether I do it directly on the basis that it has no conceivable relevance or on the basis that it has marginal relevance, its prejudicial effect clearly outweighs any probative value. [¶] I certainly uphold the objection that you do not confront this testifying witness with some other member of the organization who may or may not have a criminal record such as the kind you have described."

IV. Verdict and Post-Trial Matters

The jury returned a verdict awarding Burgers his repair costs of $25,226.33, nothing for diminished value, and $5,271 for the loss of use of the vehicle. The court and the parties then discussed a briefing schedule to address Burgers's motion in limine to exclude any evidence of payments made by Cardenas's insurance carrier, Insurance Exchange of the Automobile Club (AAA Insurance), to Burgers's insurance carrier, Mercury Insurance (Mercury).[2] The moving papers revealed Mercury paid Burger $25,226.33 for repair costs and then Mercury directly made a subrogation demand to Cardenas's insurance company. The parties stipulated AAA Insurance satisfied the subrogation demand. Burgers maintained Cardenas was only entitled to a credit for payments made directly to him, but not for those made to Mercury.

The trial court disagreed with Burgers and, after considering the briefing, it credited the $25,226.33 against the jury's damage awarded. This left Burgers with a net judgment of $5,271. On November 6, 2014, the court entered the judgment and, shortly thereafter, Cardenas filed a memorandum of costs; Burgers did not.

The court awarded Cardenas $12,571.09 in costs. Cardenas submitted a proposed amended judgment reflecting a net judgment in his favor and against Burgers for $7,300.09. At the February 5, 2015, hearing on the proposed amended judgment, the court ordered Cardenas to submit a declaration and supporting documentation, including his $30,000 Code of Civil Procedure section 998[3] offer of compromise. Cardenas complied and on February 27, 2015, the court signed the amended judgment.

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[2] The court had earlier ruled the jury could be told the parties stipulated the vehicle's repairs totaled $25,226 and allowed the parties to submit further briefing on the motion in limine.

[3] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

DISCUSSION

I. Evidentiary Errors

We review the trial court's ruling on the admissibility of evidence for abuse of discretion. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.) An abuse of discretion occurs only when the trial court's ruling exceeds the bounds of reason, taking into consideration all of the circumstances. (*Ibid*.) "Even where a trial court improperly excludes evidence, the error does not require reversal of the judgment unless the error resulted in a miscarriage of justice. [Citation.] [The party claiming error] has the burden to demonstrate it is reasonably probable a more favorable result would have been reached absent the error. [Citations.]" (*Ibid.*)

A. Evidence of the 2014 Trade-In and Subsequent Sale

Burgers contends the trial court erred in admitting evidence of the June 2014 trade in and Rusnak's subsequent sale of the vehicle because the time to determine damages was "'immediately after the incident" or injury, not over a year later when the trade in and subsequent sale occurred. Burgers's analysis is flawed.

We agree with Burgers that the measure of damages is to be determined at the time of the injury. "It is well established that under [Civil Code] section 3333, the measure of damages for the loss or destruction of personal property is generally determined by the value of the property at the time of such loss or destruction. [Citations.]" (*Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558, 567.)

What we disagree with is Burgers's apparent claim as to what evidence may be used to determine the value of the loss. Burgers argues, "that to measure damages caused by an accident and/or casualty, one does not assess fair market value by looking into the future events. Such . . . future events cannot be seen by anyone in the United States, including inside a [c]ourtoom . . . ." He is incorrect.

"Market value of personal property may . . . be established by testimony of expert witnesses, but this is not the only method, and it has been generally held that the

reasonable value of marketable personal property may be shown by market prices or actual specific sales of *other similar* property, provided such sales are bona fide and not too remote in time or place. [Citations.] [¶] Similarly it has been held that market value of personal property may be shown by the price paid for that identical property *or by the price obtained for it at a subsequent sale*. [Citations.]" (*Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 756, italics added (*Bagdasarian*); accord, *Stroman v. Lynch* (1949) 91 Cal.App.2d 406, 408 ["resale price was competent evidence of value"].) Under *Bagdasarian*, the trial court did not err in admitting evidence of the subsequent purchase price of the vehicle, or the trade in value, as both were part of the same purchase, with the trade in amount affecting the total amount paid. Exclusion of the evidence complained of by Burgers would have constituted prejudicial error. (*Goren v. Griffin* (1957) 152 Cal.App.2d 35, 47.)

We also reject Burgers's argument the evidence should have been excluded under Evidence Code sections 815 and 816, under which "a witness may take into account as a basis for his opinion" the sale price of the property or comparable property where the sale was "made freely in good faith within a reasonable time before or after the date of valuation." According to Burgers, the sale of the vehicle one and one-half years after the date of loss was not "within a reasonable time" and there was no evidence showing Rusnak's resale was made in "good faith" as required by the Evidence Code.

He fails to appreciate questions of timeliness and good faith involve factual disputes for a jury to decide. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 886 [rejecting claim "evidence should not have been considered since the other leases predated the breach by almost two years[]" because "[t]his merely went to the weight which the trier of fact, in its discretion, gave to the evidence"]; *Bagdasarian, supra,* 31 Cal.2d at pp. 758-759 [evidence property sale price untrustworthy went to weight of evidence proving value not admissibility]; *San Diego Gas & Elec. Co. v. 3250 Corp.* (1988) 205 Cal.App.3d 1075, 1083 [evidence it was "an involuntary or forced sale" goes

to weight of evidence not its admissibility]; *Casey v. Casey* (1950) 97 Cal.App.2d 875, 882 [issues of remoteness goes to weight of evidence not admissibility].) In light of the above, we conclude the court did not abuse its discretion in admitting evidence of the vehicle's trade in and subsequent sale.

B. Testimony of Subsequent Purchaser

Burgers makes the related argument that the court erred in excluding testimony from the subsequent purchaser, Copelan, to show he had no "idea the [v]ehicle had been sever[e]ly and structurally damaged." To support this contention, he cites to a jury instruction's definition of fair market value. "'Fair market value' is the highest price that a willing buyer would have paid to a willing seller, assuming: . . . 2. That the buyer and seller are fully informed of the condition and quality of the [item of personal property].'" (Former CACI No. 3903J [in effect when the case was tried].) However, Burger does not show how the court abused its discretion in ruling Copelan's testimony would be duplicative and redundant of other testimony.

Both experts testified a clean CarFax report, even if erroneous, allows for a higher reasonable price or fair market value for the vehicle. Whereas, a CarFax report reflecting a prior accident at the time of Burgers's trade in and resale by Rusnak would have reduced its value. The experts agreed a potential buyer would not have purchased the vehicle for its full retail value if the accident and repairs had been disclosed. Burgers fails to enlighten us as to what Copelan's proposed testimony would have added. To the extent Burgers intended to introduce Copelan's testimony to show "Rusnak . . . was using the 'CarFax Report' to deceive the buyers and public," he provides no explanation how that has any relevance to the issue of the vehicle's diminution in value. We conclude Burgers failed to show any abuse of discretion.

C. Exclusion of Evidence to Impeach Thomas

Burgers next contends the court erred in excluding all the evidence he hoped to use to impeach Thomas. Specifically, he asserts the court erroneously excluded

the following evidence regarding IAAA: (1) it "may not be more than a front for the insurance industry;" (2) IAAA "has no training requirement"; (3) one of its members "admit[ted] that the only training he has was first year automobile shop in high school"; and (4) another member was an 80-year-old pedophile. No error occurred.

The trial court has discretion to exclude impeachment evidence if it is "collateral," i.e., when the examiner elicits "otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it." (*People v. Mayfield* (1997) 14 Cal.4th 668, 748, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.) A collateral matter is one that has no relevance to prove or disprove any issue in the case. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9; *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1029.)

Burgers is correct that under Evidence Code sections 210 and 780, a jury may consider any matter having a tendency to disprove Thomas's testimony or credibility. But he does not explain how the excluded evidence does that. Thomas denied knowing Romer, his qualifications, or his training. And although Thomas knew who Sombrero was, and admitted to having been an umpire for him, that was all Thomas knew about him. The excluded evidence was collateral to Thomas's credibility inasmuch as it related to matters of which Thomas had no knowledge and did not refute or affect his testimony. We perceive no abuse of discretion in the court's ruling.

II. Instructional Error

Burgers contends the court erred in refusing his request to modify CACI No. 3903J. The contention lacks merit.

At the time of the 2014 trial, the standard CACI No. 3903J contained four paragraphs. The first paragraph provided: "To recover damages for harm to personal property, [*name of plaintiff*] must prove the reduction in the [*item of personal property*]'s value or the reasonable cost of repairing it, <u>whichever is less</u>. [If there is evidence of

both, [*name of plaintiff*] is entitled to the lesser of the two amounts.]" (Former CACI No. 3903J, underscoring added.)

The second paragraph described how a jury should calculate "reduction in value" by comparing the property's fair market value before and after the harm occurred. (Former CACI No. 3903J.) The third paragraph defined the term fair market value.

The fourth paragraph, contained entirely in brackets, provided: "[If you find that [*name of plaintiff*]'s [*item of personal property*] cannot be completely repaired, the damages are the difference between its value before the harm and its value after the repairs have been made, plus the reasonable cost of making the repairs. The total amount awarded may not exceed the [*item of personal property*]'s value before the harm occurred.]" (Former CACI No. 3903J, underscoring added.)

Burgers requested CACI No. 3903J be modified to omit the language we have underscored above. Replying on *Merchant etc. Assn. v. Kellogg E. & D. Co.* (1946) 28 Cal.2d 594, 600 (*Merchant*), Burgers argued at trial, "'[I]f the property cannot be repaired back to its pre-accident condition, then the plaintiff is entitled to the cost of the repairs plus the loss of value." And "even if the car is repaired back [to the same condition], it still has a diminution of value because the public will not accept that" and the underscored language was unnecessary because "counsel stipulate[d] the car wasn't completely repaired back to its pre-accident condition."

In the *Merchant* case, the court upheld a damage award that included both the costs of repairs and the diminution in value of a new machine that fell off a truck while it was being transported to its purchaser. (*Merchant, supra,* 28 Cal.2d 594, 595-596.) In reaching this determination, our Supreme Court reasoned there was ample evidence that although the new machine was repaired it could not be "restored to its previous condition." (*Id.* at p. 600.) It stated, "'if the damaged property *cannot be completely repaired*, the measure of damages is the difference between the value before the injury and its value after the repairs have been made, plus the reasonable cost of

making the repairs. [Citations.] The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases in which the injured property 'can be *entirely* repaired.' [Citation.] This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value. [Citation.]" (*Ibid.*, italics added.)

The trial court denied the requested modifications after concluding the instruction's fourth paragraph specifically addressed and adopted the holding in *Merchants*. The court noted the paragraph instructed the jury what to do "'if you find that the personal property cannot be *completely repaired*,' which is what is basically the case here pursuant to the experts, 'the damages are the difference between its value before the harm and its reasonable value after the repairs have been made, plus the reasonable cost or making the repairs.'" (Italics added.) In the court's view, "that tells [the jurors] everything they need to know. And, bear in mind, they're not doing this in a vacuum. You get to make your closing arguments."

The trial court also rejected Burgers's argument the "'whichever is less'" language in the instruction's first full paragraph would confuse the jury. The court concluded the jury had only one number to determine since the "'less' only refers to reduction in the value of a reasonable cost of repair where it could be *completely repaired*." (Italics added.) The court gave the jury the entire standard instruction, including the fourth paragraph. It stated this meant Burgers may recover a "reduced value in addition to cost of repairs."

On appeal, Burgers asserts it was undisputed the vehicle was "completely repaired" and the fourth paragraph erroneously instructed diminution of value could not be awarded for his vehicle. He adds that because his vehicle was fully restored, the

instruction's first paragraph improperly limited his recovery of damages to either the cost of repairs or reduction in value, *whichever was less*. In addition, Burgers discusses at length the role he played in the Judicial Council's 2016 revision of CACI No. 3903J. He suggests the revision proves the trial court in his case gave an incorrect instruction.

We disagree with his argument for two reasons. First, the new version of CACI No. 3903J did not change the law. Some of the original language copied directly from the *Merchant* case was rephrased, but this simply served to clarify the jury's options. In addition, the order of the paragraphs was changed to assist the jury's understanding of its choices. For example, the fourth paragraph in the old version, applied the *Merchant* case terminology "completely repaired." It informed the jury to award both diminution and costs of repairs if it found the vehicle "cannot be completely repaired." As discussed in *Merchant,* this rule applied if there were repairs but the property could not be restored to its previous condition and value. In the revised instruction, this paragraph now reads the jury can award both kinds of damages if it finds the vehicle "can be repaired but after repairs will be worth less than it was before the harm." The revision simply supplied a more straightforward way of saying, "cannot be completely repaired."[4]

Second, contrary to Burgers's contention on appeal, the evidence at trial overwhelmingly established his vehicle, although undergoing repairs, could not be completely restored to its previous condition and value before the collision. At trial,

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[4] In the updated version of CACI 3903J the first paragraph was unchanged. It provides personal property damages is diminution in value or repair costs, whichever is less. As mentioned the first line of the next paragraph was updated to say, "However, if you find that the [e.g., *automobile*] can be repaired, but after repairs it will be worth less than it was before the harm, the damages" are diminution *plus* costs of repair. The wording describing those damage options is the exact same language as used in paragraph four of the original instruction. The final paragraphs define reduction in value and fair market value, using essentially the same language as the original instruction, and adding for clarification that "reduction in value" is calculated only "if repairs cannot be made."

"counsel stipulate[d] the car wasn't completely repaired." During closing argument, Burgers's counsel specifically argued, "it is undisputed that this car could not be completely repaired as it was in the factory[;] although we have no objection [the repair shop] is very good, they cannot repair this car back to the factory standard as manufactured." His expert testified to the same effect. According to Avellini, although the vehicle was repaired, "there were certain important items that were eliminated from the after-market collision process that could never be duplicated . . . from the factory" version.

We note Burgers cites to no facts supporting his new claim the vehicle was "completely repaired." As such, there was no reason to suspect the jury would be confused about its damage award options. Burgers's argument he was entitled to the most recent version of the jury instruction lacks any supporting prejudice argument. We will not speculate how the new instruction, containing the same law but simply phrased differently, would have made a difference in Burgers's case. (*Adams v. MHC Colony Park, L.P.* (2014) 224 Cal.App.4th 601, 613-618 [to obtain reversal appellant must establish claimed instructional error was prejudicial].) In light of all of the above, we conclude CACI No. 3903J, as given, permitted the jury to award both diminution of value and repair costs and not the lesser of the two.

III. Entitlement to Credit

We begin by briefly summarizing the court's ruling with respect to the credit. The jury's verdict awarded Burgers his repair costs of $25,226.33 and $5,271 for the loss of use of the vehicle. It determined nothing was owed for diminished value, the total verdict was for $30,497.33. The court deducted $25,226.33, the amount at issue in the subrogation action. This left Burgers with a net recovery of $5,271. Burgers contends this ruling is incorrect because trial court failed to follow California Supreme Court decisions regarding the collateral source rule and the "made-whole" rule. He is wrong.

It is true the collateral source rule generally precludes a tortfeasor from reducing its liability to a plaintiff because of any insurance recoveries the plaintiff may have received as a result of the injury. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551.) "Thus, the tortfeasor remains liable for all of plaintiff's damages, even though plaintiff has been compensated by his or her insurer. [Citation.]" (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2016) ¶ 9:37, p. 9-11, hereafter Croskey.)

Burgers fails to appreciate "[t]he collateral source rule is *inapplicable* to subrogation claims." (Croskey, *supra,* Insurance Litigation, ¶ 9:37, p. 9-11, citing e.g., *Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1572 (*Garbell*); *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal.App.4th 23, 35.) "'When the insurance carrier becomes subrogated to the claim of an insured against a third party tortfeasor, the payment of insurance proceeds *is no longer a collateral source*." (*Garbell, supra,* 193 Cal.App.4th at p. 1572, italics added.)

The *Garbell* case is instructive. There, insured homeowners received the policy limits ($424,050) from their insurance company, Fire Insurance Exchange (FIE), for damages sustained to their home following a fire created during flooring renovations. (*Garbell, supra,* 193 Cal.App.4th at p. 1565.) This insurance payment covered approximately half of their losses and the homeowners sued the renovation contractor, Conejo Hardwoods (Conejo). (*Ibid.*) FIE filed a subrogation lawsuit directly against Conejo to recover what it paid the homeowners and eventually reached a settlement with Conejo. (*Id.* at pp. 1565-1566.)

In the *Garbell* case, the jury returned a verdict attributing 55 percent of the fault to Conejo for the homeowner's total loss of $822,483.45, resulting in a judgment against Conejo of $452,365.90. (*Garbell, supra,* 193 Cal.App.4th at p. 1566.) The court then deducted the $424,050 insurance payment at issue in the subrogation action, leaving a net recovery of $28,315.90. (*Ibid.*) The homeowners appealed, asserting the damages

were miscalculated and they made a collateral source rule argument. The appellate court affirmed the judgment, holding the homeowners "fundamentally misunderstand[] their insurer's subrogation rights and the judgment." (*Garbell, supra,* 193 Cal.App.4th at p. 1571.)

The *Garbell* court ruled as follows: "Upon paying the [homeowners] $424,050 on their insurance policy, FIE became subrogated in that amount and 'step[ped] into the shoes' of the [homeowners] to the extent of the insurance payment. [Citations.] 'Subrogation is the "substitution of another person in place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or claim." [Citation.]' [Citation.] '"In the case of insurance, subrogation takes the form of an insurer's right to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid. [Citations.]" [Citation.]' [Citation.] In other words, subrogation does no more than assign to the insurer the claims of its insured against the legally responsible party. [¶] When the insured is only partially compensated by the insurer for a loss, as was the case here, the subrogation doctrine results in two or more parties having a right of action for recovery of damages based upon the underlying negligence. [Citations.] FIE had a subrogation right (either as a party joined to this action or in a separate action) to recover its insurance payment of $424,050 from [Conejo], and the [homeowners] had a right to recover for their uninsured loss. In essence, FIE and the [homeowners] split the right to recover from [Conejo] for its negligence. By virtue of the subrogation, the [homeowners] assigned the right to recover the insured portion of the total damages ($424,050) to FIE." (*Garbell, supra,* 193 Cal.App.4th at pp. 1571-1572.)

The *Garbell* court explained the trial court correctly calculated damages. "The jury determined the total damage to the personal property in the [homeowners'] home was $822,483.45, attributing 55 percent of the fault to Conejo [making] Conejo . . . liable for $452,365.90 in damages. The [homeowners], however, had assigned their right

to recover $424,050 of those damages to FIE in the subrogation action. [Conejo] presumably paid FIE to settle the subrogation action and was not obligated to pay the [homeowners] any portion of that $424.050. Thus, the trial court correctly deducted that amount . . . ." (*Garbell, supra*, 193 Cal.App.4th at p. 1572, fn. omitted.)

The *Garbell* court rejected the homeowners' argument Conejo "should not be granted a 'credit' because [the homeowners] had the foresight to obtain insurance." (*Garbell, supra*, 193 Cal.App.4th at p. 1572.) It recognized this was a collateral source rule argument and stated, "the subrogation doctrine, however, *modifies* the collateral source rule. [Citation.]" (*Ibid.*, italics added.) The court referred to the Supreme Court decision, *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 9-11 (*Helfend*), which defined the collateral source rule as allowing an injured party, who has received compensation for injuries from a source wholly independent of the tortfeasor, to keep that payment in addition to any money collected from the tortfeasor. However, the *Garbell* court found significant the "*Helfend* court . . . emphasized that the collateral source rule does not require that a tortfeasor pay double for his or her wrong to both the injured party and to reimburse the collateral source. [Citation.] Thus, the collateral source rule addresses whether the insured may recover against tortfeasors even though it has been compensated by the insurer; it does not address the insurer's right to recover in a subrogation action for its payments to the insured. [Citation.] When the 'insurance carrier becomes subrogated to the claim of an insured against a third party tortfeasor, the payment of insurance proceeds is no longer a "collateral source."' [Citation.]" (*Garbell, supra,* 193 Cal.App.4th at p. 1572.)

To briefly summarize, the collateral source rule has nothing to do with whether an insurer can recover through subrogation the amount of benefits it paid to its insured. Essentially, when an insurance carrier becomes subrogated to the claim of an insured against a third-party tortfeasor, the insurer's *status changes* from being a

collateral source to that of a co-injured party entitled to damages for the injury. The amount of benefits paid becomes the measure of the insurer's share of the damage award.

We note the cases Burgers cites in his briefing are inapt because they either do not involve subrogation rights or the insurance carrier waived its subrogation rights. (See, e.g., *Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 734 [no subrogation claim]; *Helfend, supra,* 2 Cal.3d at p. 17 [no subrogation issue]; *Miller v. Ellis* (2002) 103 Cal.App.4th 373, 381 [waiver].) The other cases he cited decided unrelated issues. For example, *Howell, supra,* 52 Cal.4th 541, held the collateral source rule does not expand scope of damages to medical expenses never incurred. And *21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511, involved a party not allowed to assert a subrogation claim and the court addressed the narrow issue of whether the "made-whole rule" included liability for attorney fees.

In conclusion, Burgers received $25,226.33 from his insurance company, which became partially subrogated to his claim against Cardenas up to that amount. The insurer's status changed from being a collateral source to being a party co-injured with Burgers. Consequently, the trial court correctly followed the law and credited Cardenas with the payment he made (via his insurance) to the co-injured party (Mercury).

Burgers raises an alternative argument based on the "made-whole" rule that we need only briefly discuss because he provides no supporting legal authority. He maintains Mercury did not have a right to subrogation until after Burgers was "made whole" i.e., meaning his vehicle was repaired to its pre-accident condition. Burgers asserts Mercury's policy merely paid for repairs, which did not restore his vehicle to its pre-accident condition or cover its diminished value or his loss of use.

"The made-whole rule is a common law exception to insurer's right of subrogation. [Citation.] In general, the doctrine 'precludes an insurer from recovering any third party funds unless and until the insured has been made whole for the loss.' [Citation.] 'The applicability of the doctrine generally depends on whether the insured

has been completely compensated for all the elements of damages, not merely those for which the insurer has indemnified the insured.' [Citation.] *California courts recognize two general limitations on the applicability of the made-whole rule.* [Citation.] First, an insurer may disclaim the made-whole rule in an insurance contract by using clear and specific language that indicates the parties' intent to permit the insurer to seek reimbursement even if the insured has not been made whole. [Citations.] Second, the made-whole rule does not apply if the insurer participates in prosecuting the claim against the third-party tortfeasor. [Citations.]" (*Chandler v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 2010) 598 F.3d 1115, 1118, italics added (*Chandler*); 16 Couch on Insurance (3d ed. 2016) § 223:147 [terms of policy override "made whole" rule].)

With respect to the second exception, "[O]ne must keep subrogation claims against insureds *separate from* subrogation claims against third-party tortfeasors. As between insureds and insurers, California law is clear that an insurer may seek subrogation ***from an insured*** only if the insured's recovery exceeds that to which he is entitled, i.e., only after the insured has been made whole. [Citation.] . . . However, [the rational supporting this rule] is inapposite where, as here, the insured has not yet sought to recover from the third-party tortfeasor and the insurer seeks subrogation directly from the tortfeasor's insurer, because under such circumstances, there is no indication that the insured will not be made whole if he sues the third-party tortfeasor. [Citation.] Rather, the insurer should bear the risk of loss only where it is clear that 'the loss of one of the two must go unsatisfied.' [Citation.]" (*Chandler*, *supra*, 598 F.3d at p. 1120, italics added.) "A rule that would prevent an insurer from recouping its payout until after the insured has been made whole would place the risk of loss on the insurer whenever the insured does not attempt to recover from the third-party tortfeasor, even when the insured could obtain a full recovery from the third-party tortfeasor." (*Ibid.*)

Burgers's argument on appeal falls short because he completely failed to address why the "made-whole" rule should apply when the subrogation claim was not

made against him (the insured) but rather made directly against the tortfeasor's insurance. He provides no authority to support the theory "made whole" meant the recovery of damages sufficient to restore his vehicle to a pre-accident condition plus loss of use. He provides no discussion of his insurance policy with Mercury and whether it contained any specific provision limiting application of the "made-whole" rule. "It is an established rule of appellate procedure that an appellant must present a factual analysis and legal authority on each point made or the argument may be deemed waived. [Citations.]" (*People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1200.) Burgers's failure to provide us with any cogent analysis of his argument waives his claim on appeal. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685 ["appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority"].)

IV. Section 998 Costs

Burgers maintains he was entitled to costs under section 998 because he prevailed at trial with a jury verdict of $30,497.33, which exceeded Cardenas's $30,000 section 998 offer. He maintains the court erred in reducing "the verdict" by $25,226.33—the amount Cardenas's insurance paid to Burgers's insurance Mercury—and then awarding costs to Cardenas under section 998.

Without supporting case authority, Burgers argues the $25,226.33 payment is merely a "credit" against the judgment, which he says is different from an "offset" against the judgment. He also maintains offsets and settlements are not relevant in deciding who is the prevailing party entitled to costs. Burger argues this issue is one of first impression, however, he also refers to six cases he claims support his theory credits and setoffs do not affect a plaintiff's right to costs.

We begin by noting the above legal argument was considered and rejected (and the six cited cases expressly overruled or distinguished) by our Supreme Court in

Goodman v. Lozano (2010) 47 Cal.4th 1327, 1330, 1336-1337 (*Goodman*).[5] Burgers does not mention *Goodman* or acknowledge the cases he cites concern an interpretation of section 1032, not section 998. This is a distinction that makes a difference.

Section 1032, subdivision (b), provides that "[u]nder certain circumstances, a trial court must award costs and even attorney fees in favor of a 'prevailing party' in an action. [Citation.] 'Prevailing party,' as relevant here, includes 'the party with a net monetary recovery.' (§ 1032, subd. (a)(4); hereafter, section 1032(a)(4).)" (*Goodman, supra,* 47 Cal.4th at p. 1330.) In the *Goodman* case, plaintiffs settled with several defendants for an amount greater than the damage award against nonsettling defendants. The court held that because the judgment was entirely offset by the amount received from settling defendants, resulting in a "zero judgment," plaintiff did not have a "'net monetary recovery,'" as defined by section 1032. (*Ibid.*) The parties agree Burgers's net monetary recovery against Cardenas was for $5,271 ($30,497.33 verdict minus $25,226.30 offset).

The conclusion Burgers prevailed because he received a net monetary recovery within the meaning of section 1032 does not automatically result in a cost award here. Cardenas made a $30,000 pretrial settlement offer under section 998. That section provides in pertinent part: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer." (§ 998, subd. (c)(1).)

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[5] The Supreme court overruled *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, and distinguished *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, 214-215; *Pirkig v. Dennis* (1989) 215 Cal.App.3d 1560, 1566-1568 & fn. 5; *Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 112-113; *Ferraro v. Southern Cal. Gas Co.* (1980) 102 Cal.App.3d 33, 52-33, to the extent those cases held the meaning of section 1032's "net monetary recovery" did not include offsets for settlements. (*Goodman, supra,* 47 Cal.4th at p. 1338.)

"Section 998 modifies the general rule of section 1032 . . . ." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1112.) In short, section 998 represents "a cost-shifting statute which encourages the settlement of actions, by penalizing parties who fail to accept reasonable pretrial settlement offers." (*Heritage Engineering Construction Inc. v. City of Industry* (1998) 65 Cal.App.4th 1435, 1439.) It is also well settled "the determination of whether the plaintiff recovered more or less than the amount offered by the defendant for the purpose of applying section 998 is to be made taking into account *any other settlements entered as of the time the section 998 offer was outstanding*, but not considering settlements that had not yet been reached." (*Guerrero v. Rodan Termite Control, Inc.* (2008) 163 Cal.App.4th 1435, 1438, italics added.)

Here, it was undisputed Cardenas made a pretrial offer to settle the case for $30,000 *after* already paying $25,226.33 for repair costs (through his insurance company). Burgers rejected this offer apparently believing the jury would award him more than $55,226.33 ($30,000 plus $25,226.33). We conclude the court properly offset the $25,226.33 from the verdict when it considered whether the section 998 offer exceeded Burgers's recovery. In the briefing, Burger does not suggest the *Guerrero* case was wrongly decided nor offer any legal authority or analysis suggesting why the court incorrectly applied section 998 in awarding Cardenas his costs. We find no reason to disturb the trial court's ruling.

DISPOSITION

The judgment is affirmed. Respondents shall be entitled to their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.